THE ONTARIO HUMAN RIGHTS CODE,

S.O. 1981, Chapter 53, as amended

IN THE MATTER OF the complaint made by Mr. Paul Gregory alleging discrimination in accommodation by Donauschwaben Park Waldheim Inc., and Ms. Dorothea Schmidt.

AND IN THE MATTER OF the complaint made by Mr. Paul Gregory alleging discrimination in accommodation by W. Frank Real Estate Ltd. and Ms. Mary Franssen.

A HEARING BEFORE: Professor John D. McCamus

Appointed a Board of Inquiry in to the above matters by the Minister of Citizenship, the Hon. Gerry Phillips, to hear and decide the above-mentioned complaints.

Appearances:

R.E. Charney	Counsel to the Ontario Human Rights Commission
P. Gregory	Complainant
S.L. Wassenaar	Counsel for Donauschwaben Park Waldheim Inc.
R.G. Matthews	Counsel for Dorothea Schmidt
J. Rosolak	Counsel for W. Frank Real Estate Ltd.

I

This inquiry concerns two complaints arising from an unsuccessful attempt on the part of the Complainant, Mr. Paul Gregory, to purchase a residential property located in the countryside near Blackstock, Ontario which he understood to have been listed for sale by the respondent, Dorothea Schmidt, who was identified in the listing as the owner of the property in question. The property was listed by the respondent W. Frank Real Estate Limited. The listing, which was filed as page 60 of Exhibit 3 in this proceeding, identifies the respondent Ms. Mary Franssen as the sales representative for this listing. In his testimony, Mr. Gregory indicated that in 1986, when he was in the process of moving to the Whitby area, he contacted a real estate agent, a Ms. R. Mayer, who showed him the listing in question. When the Complainant indicated that he was interested in seeing the property, Ms. Mayer drew his attention to a note at the bottom of the listing which stated "Note: 1 person has to be German Extraction or speaking to buy this property....". Mr. Gregory testified that he advised Ms. Mayer that he believed that such a requirement would be illegal and that he therefore nonetheless wished to visit the property. Mr. Gregory did visit the property and advised Ms. Mayer that he would like to make an offer for the property at the full listing price of $ 58,900.00. Mr. Gregory further alleges that Ms. Mayer said that the offer should be verbal and that she would communicate it to the vendor. The next day she

contacted Mr. Gregory and advised him that his offer was not accepted because he did not meet the condition concerning the ability to speak German. Mr. Gregory further alleges that he then instructed Ms. Mayer to prepare a formal written offer and that such an offer was prepared by her for the full offering price but conditional upon the purchaser being able to obtain financing. Mr. Gregory has alleged that he also gave Ms. Mayer a cheque in the amount of $ 1,000.00 for a deposit. Mr. Gregory further indicated that in due course he was again advised that his offer was rejected because of the fact that, in his words, he was "Canadian, not German". On his own evidence, Mr. Gregory did not have direct contact either with the person indicated on the listing as the owner, the respondent Dorothea Schmidt, nor with the respondent Donauschwaben Park Waldheim Inc. which, as shall be further explained below, is in fact the owner of the property in question. Nor did Mr. Gregory indicate in his evidence that he had either read or considered the significance of a further notation on the listing which stated: "purchaser to be approved by Park Committe (sic)".

In due course, Mr. Gregory reported what he viewed as discriminatory treatment to the Ontario Human Rights Commission (the "Commission") and filed two complaints, both dated July 23rd, 1986, concerning this incident. The first complaint, numbered 10-314c and filed as Exhibit 2 in this proceeding, was brought against "Donavschwaben Park Waldheim Incorp." and Dorothea Schmidt. The

complaint provided a brief account of the incident described above and then alleged that the Complainant had been discriminated against with respect to the occupancy of accommodation and with respect to the right to contract on equal terms because of race, ancestry, place of origin and ethnic origin in contravention of sections 2(1), 3 and 8 of the Ontario Human Rights Code, S.O. 1981, Ch. 53, as amended (the "Code"). Those sections of the Code provide as follows:

> 2.-(1) Every person has a right to equal treatment with respect to occupancy of accommodation, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status, handicap or the receipt of public assistance.
>
> 3. Every person having legal capacity has a right to contract on equal terms without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap.
>
> 8. No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part.

The complaint relies on section 8 both with respect to the allegation that there has been a violation of section 2(1) and with respect to the alleged violation of section 3.

The second complaint, numbered 10-315c and filed as Exhibit 1 in this proceeding, was brought against W. Frank Real Estate Limited and Mary Franssen alleging that the involvement of these

two respondents in this incident amounted to the publication of a notice indicating an intention to discriminate against persons of non-German ancestry in contravention of section 12(1) and 8 of the Code. Section 8 has been reproduced above. Section 12(1) provides as follows:

> 12.-(1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.

The particular act of the respondents, W. Frank Real Estate Limited and Mary Franssen, relied upon by the Commission and the Complainant as establishing the contravention section 12(1) is the publication of the listing agreement with its requirement of "German Extraction or speaking".

At the time of the incident in question, then, the Complainant's understanding of the situation was that property owned by Dorothea Schmidt had been listed for sale, though subject to the requirement relating to ethnicity which was thought by the Complainant to be unlawful. The Complainant not only testified that he made verbal and written offers for the property at the listed price, he indicated that he approached the credit union to which he belonged and assured himself that mortgage financing would be available. Upon the investigation of this matter by the

Commission, however, it became apparent that the actual circumstances were rather different from what the Complainant had supposed. In the first place, the listed property was not in fact owned by Ms. Schmidt. Rather, it was owned by Donauschwaben Park Waldheim Inc. and, indeed, is part of a much larger parcel of land owned by that corporate body. The Donauschwaben Park Waldheim Inc. is a not-for-profit corporation incorporated under the laws of Ontario. The corporation is alleged to be a fraternal organization whose purposes, broadly speaking, are the preservation and promotion of the cultural heritage and social interests of individuals whose ethnic origin is Donauschwaben or, in its English rendering, Danube Swabian. The aims and objectives of the corporation are stated in paragraph 3 of article 1 of its by-laws, filed as page 17 of Exhibit 3, to be the following:

> "3. The aims and objectives of the association are;
>
> A. The cultivation of friendship and fellowship amongst its members and the furthering of social and cultural objectives.
>
> B. The advancement of the intellectual and physical well-being of its members.
>
> C. To support persons of Danube Swabian origin in illness, comfort, distress or death.
>
> E. To acquire, and administrate a club house and a summer camp to further the above mentioned objectives."

The by-laws further stipulate, with respect to membership, that "only persons of German origin over the age of sixteen may be

regular members". The spouses of regular members and their children over the age of sixteen could participate as members of the corporation but do not have a vote. Individuals wishing to become members of the corporation must submit an application to the Board of Directors which will then determine whether or not to accept the application in question.

The "summer camp" referred to in the articles of association, is, in fact, the large parcel of land on which the smaller property that the Complainant was interested to purchase is located. The larger parcel in question is approximately 130 acres in size. Although the corporation is the registered owner of the 130 acre parcel, regular members of the corporation become entitled, by virtue of their membership, to common ownership with all other members of the corporation of the parcel. In addition, regular members become entitled to the sole and exclusive right to occupy a particular building lot on the property. The individual member may then, at his or her discretion, place a residential facility on the building lot in question. The member could erect a building of the summer cottage variety or something more in the nature of a year-round or winterized home or may be satisfied simply to erect a tent or place a trailer on the lot in question. Of the 130 acres contained in the parcel, approximately 43 acres are utilized in this fashion for building lots for members. On the remaining 85 acres or so, a number of common facilities have been established, including a playing field, a rather large swimming area and a large

lodge or central facility. Thus, the corporation, or rather its members, own the entire parcel of 130 acres and all of the common facilities. It is the view of the President of the corporation, Mr. Anton Volk, who testified in this proceeding, that the residential facilities erected by members on individual building lots are owned by the individual member who placed the facility in question on the building lot or anyone to whom that facility was sold. Certainly, this would be true in the case of tents and trailers and other impermanent structures. Whether or not this is also true in the case of more permanent structures is more doubtful. Nonetheless it appears to be assumed by the parties to this proceeding that this point is not material to the issues in dispute between the parties. Certainly, from the point of view of the corporation and its relations with its members, it appears to have been assumed by all concerned that members are to be treated as if they own such facilities. Thus, in the event of a transfer or sale of such a facility to a new member, the transferring member would be entitled to be paid the purchase price in question. Accordingly, a regular member who wished to withdraw from membership and effect a "sale" of their cottage or other facility would be obliged to find a transferee who would be accepted as a member of the corporation. Assuming that a successful application for membership was made, the question of the purchase price to be paid for the transfer of the facility located on the building lot would be exclusively a matter between the old member and the new member. The corporation derives no profit whatsoever from

transfers of this kind although it would, of course, receive membership dues and a modest initiation fee from the new member. The initiation fee is $500.00. Annual dues are currently $125.00. Mr. Volk, who has served as President of the corporation for the past twenty-two years, indicated that the financial resources thus acquired by the corporation are used, in the main, for such matters as snow removal on weekends in the winter, cutting the grass in common areas and road maintenance on the parcel. The corporation, in short, is not in the business of buying and selling residential properties but rather is, on a non-profit basis, providing certain services to its members.

Though no direct evidence concerning any conversations that may have taken place between the respondent Schmidt and the respondent Franssen was led in these proceedings, there is hearsay evidence and circumstantial evidence which indicates that the respondent Schmidt, a member of the corporation whose husband had recently died, decided to withdraw her membership from the corporation and effect a transfer, in the manner indicated above, of the residential facility which either she and her husband or a previous occupant had erected on the building lot that their membership in the corporation entitled them to use. Ms. Schmidt apparently approached Ms. Franssen with a view to obtaining her assistance in finding a potential purchaser. The nature of any listing agreement entered into was not disclosed in the evidence. Nonetheless, the unusual nature of the actual listing for the

property, which identifies Ms. Schmidt as the "owner" of the property in question, does suggest some awareness on the part of Ms. Franssen of the special nature of this situation. The listing indicates that the purchaser must be approved by the Park Committee and that "1 person has to be German Extraction or speaking to buy this property". Whether or not Ms. Mayer, the real estate agent approached by the Complainant, was aware of all of these circumstances is also not disclosed in the evidence though, as indicated above, the Complainant did indicate that he and Ms. Mayer discussed the ethnicity or language-speaking requirement indicated in the listing. In any event, it is apparent that the Complainant, not realizing that the registered owner of the entire parcel, including the lot in question, was the Donauschwaben Park Waldheim Inc. and not appreciating the unusual nature of Ms. Schmidt's entitlement, assumed that Ms. Schmidt was the owner of the listed property and purported to make an offer to Ms. Schmidt to buy the property at the listed price. Further, having made the false assumption that he would acquire ownership rights as the purchaser of the property in question, the Complainant made inquiries with respect to the possibility of mortgage financing from his credit union. Having received encouragement from that quarter, he assumed that he would be able to pay the purchase price. In fact, however, he would not have been able to acquire the type of interest in the land which would be the subject-matter of a normal mortgage and accordingly, financing would probably not, it was suggested in the evidence, have been available to him. In his evidence, the

Complainant conceded that had he been fully apprised of all of the circumstances concerning the ownership of the land, the nature of the corporation and its activities and his likely inability to obtain mortgage financing, he would not have been interested in acquiring the listed property.

It is not obvious why the Complainant did not become at least suspicious that the circumstances concerning this property were not as he initially assumed. Apart from the signals to be found in the listing agreement, the parcel itself has signage at the main entrance indicating both the name of the park and, as well, an indication that the property is "private property" and for "members only". The Complainant testified that although he did see these signs, he nonetheless assumed that the property was rather like another similar property in Hastings, Ontario where, although there were some common facilities, the purchasers of individual residential properties obtained a clear title to the property in question. There is no reason to doubt the sincerity of the Complainant's evidence on this point and the genuineness of his belief in this regard but it may be noted in passing that if the listing of the property gave grounds for confusion, there appeared to be nothing in the appearance of the property itself that was similarly ambiguous or misleading. It should further be noted, however, that the Commission, in its submissions, argued that the sign indicating "members only" was itself at least an indirect indication of an intention to discriminate which therefore

constituted a breach of section 12(1) of the Code by the Donauschwaben Park Waldheim Inc.

Against this background, the respondents have raised a number of defences. Some of the points taken by the respondents related to the sufficiency of the evidence on various points. Thus, for example, Donauschwaben Park Waldheim Inc. has argued that there is no evidentiary basis for the conclusion that the Complainant or anyone else acting on his behalf contacted the Donauschwaben Park Waldheim Inc. and submitted an application for membership or, indeed, made any other request of the corporation. Further, it was suggested that there is no evidentiary basis for concluding that an action of any kind was taken by the corporation with respect to the Complainant. Accordingly, it is suggested that there is no basis for concluding that the corporation had discriminated against him. We shall return to these points in due course. The central issue raised by the respondents, however, is whether the Donauschwaben Park Waldheim Inc. is entitled to rely on section 17 of the Code in making its defence to the allegations of the Complainant. That section provides as follows:

> 17. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, is not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

It was argued on behalf of the Donauschwaben Park Waldheim Inc. that the corporation provides "services and facilities, with...accommodation" and that it is a "fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination" and that its membership "is restricted to persons who are similarly identified". This defence, if successfully established, is central to the complaints against Donauschwaben Park Waldheim Inc. and Dorothea Schmidt. If the Donauschwaben Park Waldheim Inc. has, for this reason, not engaged in an act of discrimination, neither has the respondent Schmidt. The extent to which this conclusion might undermine the validity of the complaints made against the respondent W. Frank Real Estate Limited and the respondent Franssen need not be considered. For reasons to be further discussed below, the validity of those complaints is not a matter requiring further consideration by this Board of Inquiry at this point in these proceedings. In order to determine whether a defense based on section 17 of the Code is available to the other respondents in the circumstances of this case, it is necessary to give further consideration to the proper interpretation of that provision and, moreover, to the particular circumstances of the present case, including the identity of the ethnic community which the Donauschwaben Park Waldheim Inc. purports to serve and the nature of the corporation's activities in this regard. Before turning to such matters, however, it is appropriate to give brief consideration to a number of procedural

questions that arose during the course of this proceeding.

II

The respondent Donauschwaben Park Waldheim Inc. was referred to in a variety of ways and by a variety of spellings in the documents filed in these proceedings and in the other evidence led by the parties. In the complaint itself, the corporation is referred to as Donavschwaben Park Waldheim Incorp. In its incorporating document, filed as pages 15 and 16 of Exhibit 3, the corporation is referred to as D.S. Park Waltheim Inc. and this is therefore, strictly speaking, the legal name of the corporation. In various other corporate documents filed in these proceedings the corporation is referred to "Donauschwaben Park Waldheim Incorporated" or as the "Association, D.S. Park Waldheim". The presence of a "t" rather than a "d" in the word "Waltheim" in the incorporating instrument was, according to Mr. Volk, an error. Presumably, reasons of convenience underly the use of the initials D.S. rather than the more complete reference to the term "Donauschwaben". While the proper mode of referring to the corporation was therefore a matter of some confusion and some discussion in these proceedings, it must be noted that no objection was taken on behalf of the respondent corporation with respect to the jurisdiction of this Board of Inquiry on the ground that the incorporation was incorrectly identified or described in the initial complaint and, indeed, in the document establishing this Board of Inquiry issued by the Minister of Citizenship, the Honourable Gerry Philips. For reasons of convenience, I shall

adopt the practice of referring to the corporation itself as "D.S. Park Inc.", to the 130 acre parcel itself as "D.S. Park" and to the ethnic group or community purportedly served by D.S. Park Inc. as "Donauschwaben" or "Danube Swabians".

III

At the commencement of the second day of this proceeding, Mr. Rosolak, who had been previously identified as counsel representing both W. Frank Real Estate Limited and Ms. Mary Franssen, reported on certain developments concerning the negotiation of a settlement of complaint 10-315c (Exhibit 1) and requested that he be removed as solicitor of record for Ms. Franssen. Mr. Rosolak reported that fruitful discussions had been conducted with counsel representing the Commission and that the parties to complaint 10-315c had agreed to the terms of a settlement. Within the previous twenty-four hours, however, Mr. Rosolak had been advised by Ms. Franssen that she was refusing to execute the formal documentation of the terms of that settlement and had begun to consult another lawyer. Mr. Rosolak further confirmed that Ms. Franssen had received notice of the date for the hearing in question and further that she had been advised that the hearing might proceed in her absence if she failed to attend. A warning to this effect is indeed contained in the standard notice forwarded to the parties to this proceeding. Upon the consent of other counsel in attendance, I thereupon acceded to Mr. Rosolak's request that he be removed as solicitor of record.

The hearing continued for the rest of that day in the absence of Ms. Franssen or anyone representing her. Following that day's proceeding, I wrote to Ms. Franssen directly and advised her that Mr. Rosolak had made such a request and that it had been granted and further advised her that the hearing had proceeded in her absence on that day. As well, I provided notice of the dates scheduled for subsequent hearings in this matter. Prior to the next scheduled hearing date, I received a written communication from Mr. Charney, counsel to the Commission, reporting that he had been advised by Mr. Rosolak that Ms. Franssen had now executed the minutes of settlement to which reference had previously been made and indicated that he would in due course ask to have minutes of settlement incorporated in an Order of this Board of Inquiry. At the commencement of argument, however, on the fifth day of this proceeding, Mr. Charney indicated that he and Mr. Matthews, counsel for the respondent Schmidt and Mr. Wassenaar, counsel for D.S. Park Inc., had agreed that they felt that it would be appropriate to provide a copy of the minutes of settlement to this Board of Inquiry only after the Board gives its final determination with respect to the other complaint, that being the complaint brought against D.S. Park Inc. and the respondent Schmidt. Accordingly, counsel requested that the Board of Inquiry remain adjourned sine die after the issuance of a decision concerning that other complaint for the purpose of receiving a copy of the minutes of settlement which might then be incorporated in an Order of this Board of Inquiry. This Board of Inquiry will therefore remain

adjourned sine die following the issuance of the present decision concerning complaint number 10-314c (Exhibit 2).

IV

At the conclusion of the introduction of evidence led by Mr. Charney on behalf of the Commission, counsel for the respondent D.S. Park Inc. and for the respondent Schmidt moved to non-suit the Commission and the Complainant and invited the Board of Inquiry to make a ruling on that motion before proceeding further with this inquiry. Counsel for the Commission, relying in part on the previous decision of a Board of Inquiry established under the Ontario Code in Nimako v. CN Hotels (1985), 6 C.H.R.R. D/2894 (Hubbard), argued that the respondents ought to be put to an election as to whether or not they would call further evidence before a ruling would be made on that motion. In the Nimako case, it was held that a respondent moving for non-suit was not entitled to a decision on the motion prior to the making of such an election. In the event that the respondent elected to call evidence, the motion would be considered on the basis of all of the evidence led in the proceeding. In coming to this conclusion, Professor Hubbard relied on a well established practice to the same effect in civil trials and upon a description of that practice to be found in Sopinka and Lederman, The Law of Evidence in Civil Cases, (1974) at pages 521-524. Having considered the submissions of counsel concerning the motions for non-suit, I ruled that I

would reserve on the motions until the conclusion of the proceedings thus, in effect, imposing on counsel for both respondents an obligation to elect whether or not they would call evidence. It would serve no purpose at this point to rehearse the reasons for that ruling in detail. It will suffice to indicate that the reasons for that ruling were substantially similar to those set forth at some length by Professor Hubbard in the Nimako case.

Upon being advised of the Board's ruling on these motions, Mr. Wassenaar, counsel for the respondent D.S. Park Inc. elected to call evidence on behalf of his client. However, Mr. Matthews, counsel for the respondent Schmidt, elected not to call evidence and then raised a further point of some difficulty. Mr. Matthews argued that he was entitled, as a result of that election, to a ruling that none of the subsequent evidence to be led in this proceeding could be considered in making the ultimate ruling on his motion for non-suit at the conclusion of this proceeding. In other words, it was the view of Matthews that as result of having elected not to call further evidence, he had effectively immunized his client from evidence that might implicate the respondent Schmidt in a contravention of the Code that might be led as part of the case put in by Mr. Wassenaar on behalf of D.S. Park Inc.

In ruling against Mr. Matthews on this motion, I indicated that the principal reason for doing so was that I viewed the

position he was advocating to be inconsistent with the power conferred on boards of inquiry by section 38(2) of the Code to add new parties to a proceeding before a board of inquiry where, in the opinion of the Board, any person appears to have infringed a provision of the Code. Thus, the Code plainly envisages that where, in the course of a proceeding commenced for the purpose of inquiring as to whether the Code has been infringed by an individual named X, the board of inquiry comes to the view that the Code may have been contravened by another individual, Y, who is not yet a party to the proceeding, the board has a discretion to add Y as a party to the proceeding. The board may do so, as is provided in section 28(3), "upon such terms as the board considers proper". Thus, if in the present case, the complaint had been lodged only against D.S. Park Inc., it is conceivable that this Board could add the respondent Schmidt as a new party to the proceeding if evidence led on behalf of D.S. Park Inc. implicated Ms. Schmidt in a contravention of the Code. If, in this sense, Ms. Schmidt would not be immunized from the impact of evidence led on behalf of D.S. Park Inc. if she were not a party to the proceeding, it surely would be inconsistent with the Code's provisions to this effect to immunize Ms. Schmidt in this fashion in a situation where she is a party to the proceeding but has elected not to call evidence on her own behalf. Having so ruled, I then indicated to Mr. Matthews that it was my view that in the event that evidence led on behalf of D.S. Park Inc. did implicate Ms. Schmidt, it was my view that the respondent Schmidt was not bound by the election

to not call further evidence and should have such further opportunity as may be appropriate to lead evidence on her own behalf.

If I have reached the correct conclusion in ruling on these motions, it may be wondered whether, as a practical matter, the motion for a non-suit has a significant role to play in inquiries under the Code, at least in cases where more than one respondent is involved. While the analogy of practice in civil trials will often be fruitful in the context of proceedings under the Code, it must be remembered that inquiries under the Code have a rather different structure than the ordinary civil claim before the courts. Unlike the ordinary civil claim, a complaint made under the Code is subject to an investigation by a public agency established for the purpose of so doing, the Ontario Human Rights Commission. The appointment of a board of inquiry to conduct a hearing for the purpose of determining whether or not the complaint is meritorious may occur only where the Minister of Citizenship has been requested to do so by the Commission, the Commission having satisfied itself, in the language of section 35(1), that "the evidence warrants an inquiry". Further, the proceedings of the Board of Inquiry itself appear to have something of the character of a public inquiry. Thus, as mentioned above, under section 38 of the Code, the Board of Inquiry may add parties to the proceedings upon such terms as the Board considers just in situations where individuals who are not parties to the proceeding

are implicated in a contravention of the Code by evidence led on behalf of individuals who are already parties to the proceeding. It may be, then, that the protections afforded to plaintiffs by the non-suit device in a civil trial may be, to some extent, inconsistent with the public enquiry nature of a proceeding under the Ontario Code. For present purposes, however, it should be emphasized that the narrow questions raised before this Board of Inquiry and upon which this Board has ruled were, firstly, whether a respondent is entitled to have a ruling on a motion for non-suit prior to making an election to call or not call evidence and, secondly, whether in a proceeding involving more than one respondent, a respondent who moves for a non-suit and then elects to not call evidence can be immunized from being implicated in a contravention of the Code by evidence led on behalf of another respondent. For the reasons indicated above, I ruled against granting either of these requests.

V

The central question raised in this case is whether the respondent D.S. Park Inc. is entitled to avail itself of the defence afforded by section 17 of the Code on the ground that it is a fraternal or social institution or organization that is primarily engaged in serving the interests of a particular ethnic community and that it restricts its membership to members of that community. Section 17 has been reproduced in full in section I of this decision. In order to consider the applicability of the

section 17 defence to this case, it will be useful to set out at greater length an account of the evidence concerning the nature of D.S. Park Inc. and its activities and the nature of the D.S. Park itself.

As a preliminary point, it will be useful to indicate something of the origins of the Canadian Danube Swabian community. Danube Swabians are people of German ethnic extraction and language whose ancestors were among the pioneer settlers in the basin of the Danube river in south-eastern Europe. The land settled by the Danube Swabians was part of the Habsburg Crown lands which were recovered from the Ottoman Turks in the late 17th century. Emigration from Germany to the recovered lands was encouraged from then on into the 18th century. The land in question has, since the 1920's, been divided between Hungary, Yugoslavia and Romania. As many of the settlers were German Swabians, all of the German speaking settlers became called Swabians by the Magyars. In the present century, when contact between the German peoples in the Danube basin and Germany itself was restored, the Danube community began to refer to itself as Danauschwaben or Danube Swabians in order to distinguish themselves from German Swabians. The Danube Swabian community in south-eastern Europe was essentially agricultural in nature. The bulk of the population, according to the evidence led in this proceeding, lived in towns and villages of 1000-8000 people. The language of the Danube Swabians evolved into a dialect which is not readily understood in Germany. The

community developed its own traditions and culture through the 18th, 19th and early 20th centuries. The tranquillity of the Danube Swabian community was unsettled after World War I, when large parts of Hungary were awarded to Romania and Yugoslavia. More traumatic, however, were developments in the wake of World War II. The Danube Swabians were deprived of all of their possessions, including their land, and were the victims of mass expulsions. They became displaced persons without a country and were placed in camps established for such persons.

Many Danube Swabians emigrated to Canada long before the 20th century turmoil engulfed Europe. There were, however, waves of immigration following both World War I and World War II. Many of the estimated 65,000 Canadian Danube Swabians have, of course, been born in this country. A number of Danube Swabian communities have formed clubs of various kinds. Indeed, Exhibit 4 in these proceedings is a letter from the General Secretary of the "Alliance of the Danube Swabians in Canada."

The thirty-eight founding members of D.S. Park Inc. were all Danube Swabians. The objectives of D.S. Park Inc, which have been set out in full earlier in this decision, indicate that the organization has been formed, in general terms, for the purpose of promoting the social and cultural interests of the Danube Swabian community. The President of D.S. Park Inc., Anton Volk, stated in his testimony that the overriding purpose of the "club" was to try

to "keep our culture going". The group has the ambition of showing the young people what it was like back home, teaching them the language and customs of the Danube Swabians and making them feel proud of their heritage. From the point of view of Mr. Volk, the operation of the D.S. Park is very much part and parcel of the organization's attempt to attain these objectives. According to his evidence, the D.S. Park is a recreational property which is the focal point for community cultural and social life during the summer months. Three different kinds of evidence were submitted with respect to the nature of the D.S. Park and the activities that occur there. Mr. Volk testified at some length with respect to these matters. As well, Exhibit 3 contains an account of various aspects of the organization of the Park and the activities that occur there. Finally, upon the motion of counsel for the Commission, this Board exercised the discretion conferred by section 38(5) of the Code to take a view of the D.S. Park. Accompanied by counsel and by the parties, I visited the Park for the better part of one day. I was given information concerning the Park and its activities by Mr. Volk and was afforded an opportunity to ask questions of him. Upon resuming the formal hearings subsequent to the visit to the D.S. Park, counsel were afforded a full opportunity to further examine Mr. Volk.

As has previously been indicated, the D.S. Park is a parcel of land of approximately 130 acres set in the countryside some distance from the nearest municipality which is Blackstock,

Ontario. It is not a great distance from the larger community of Port Perry, Ontario and is located in the midst of rural property which appears to have agricultural and recreational uses in the main. With its large central lodge and dining facility, swimming hole and playing areas, the D.S. Park has very much the appearance of a summer camp or private club. The forty-two acres that are divided up into building lots circle around the main common areas. As counsel for the Commission has stressed, it is true that many of the structures erected on those building lots have an appearance of permanence to them more characteristic of year round homes than summer cottages. Two explanations for this were offered by Mr. Volk. First, compliance with local building regulations, it was said, results in the erection of substantial structures. Second, many of the homes are winterized because the members of the association often use their premises on weekends in the wintesr. Indeed, snow removal services are made available on winter weekends. No snow removal service is provided through the week, however. In addition to more substantial structures of this kind, however, a number of building lots did indeed appear to have more modest structures or, indeed, trailers or space for tenting.

The evidence concerning the activities of the members of the D.S. Park Inc. at the D.S. Park itself portrayed a broad range of social and cultural activities. The evidence of Mr. Volk, which was not challenged or disputed in any way, was that a normal range of social and athletic activities occur at the D.S. Park. More

than this, however, there are activities more explicitly linked to the Danube Swabian culture or heritage. There is both a folk dancing group and a choir. There are two bands - an accordion band and a brass band or "oompah band". These groups, wearing Danube Swabian costumes often participate in such events as the local Blackstock fair. Religious events or ceremonies take place in the park. The members occasionally visit other Danube Swabian groups at their facilities. In return, youth groups from other Danube Swabian communities often visit D.S. Park. There is a women's group which organizes such activities as handicrafts, bake sales and the like. In addition to this, the group meets regularly and develops projects relating to the maintenance and improvement of the D.S. Park. The meetings are conducted in German. It is necessary, Mr. Volk said, for all members of the D.S. Park Inc. to participate in these projects. He indicated that virtually every weekend there is work of some kind to be done, whether road maintenance, cutting grass, maintaining the soccer field or swimming hole, etc. Many of the cultural and social activities are carried on through the winter months in Toronto where the D.S. Park Inc. maintains a club house. Thus, for example, the Danube Swabians normally participate in the annual multi-cultural festival held in Toronto, called Caravan, by creating a Danube Swabian pavilion, usually called "Blue Danube".

In summary, then, the activities of the D.S. Park Inc. appear to be quite consistent with the stated objectives of the

organization. It is a not-for-profit corporation carrying out a program of social and cultural activities which are, broadly speaking, designed to preserve, enjoy and pass on to future generations the cultural heritage of the ethnic community to which its members belong.

Against this background, counsel for D.S. Park Inc. argues that circumstances of this case are ideal for the application of section 17 of the Code. Counsel for the Commission has argued in response, however, that section 17 cannot apply to these facts because of the central importance of the accommodation made available to members of D.S. Park Inc. to the activities of the organization. Counsel for the Commission has argued that the D.S. Park is essentially a normal rural subdivision, albeit with some incidental cultural and recreational activities involving the residents of the subdivision, and that, as such, it cannot be protected by section 17. In my view, however, the proper interpretation of section 17 and its applicability to the present facts are questions of some difficulty. The principal source of these difficulties, no doubt, is that the underlying philosophy of section 17 appears to run counter to the underlying egalitarian philosophy of the anti-discrimination measures adopted in the Code. If the Code generally promotes a social and economic climate in which decisions based on discriminatory criteria are absent, section 17 permits the creation of islands of exclusivity for certain purposes within a broader sea of social and economic

equality. It seems obvious, therefore, that section 17 should not be given so expansive a reading that it undermines the egalitarian objectives of the Code. But it is not obvious what the outer boundaries or the limiting considerations, in an interpretation of section 17, ought to be. No doubt, the Code permits the creation of exclusive organizations and institutions in order to permit the fostering of certain other objectives, be they, for example, religious, educational or cultural, whose attainment is not considered to be, broadly speaking, inconsistent with the attainment of the objectives of the Code. Thus, if the Code envisages a non-discriminatory market place for employment and goods and services, for example, it also envisages that the promotion of religious belief through the creation of institutions whose exclusivity is protected by section 17 is not inconsistent with that objective. Thus, Christian churches, for example, may restrict their membership to adherents of the Christian faith, even though this has the effect of restricting the availability of whatever services are provided to members of the congregation on a discriminatory basis. But what of a group of co-religionists who form a club that then purchases an urban neighbourhood and makes residential properties available only to members of the club. The permission of such activity would substantially undermine the objectives of the Code. But on what basis would section 17 not apply to such facts? There appear to be two answers to this question. First, it is not at all obvious that a "religious land-owning club" is the kind of religious "institution or organization"

that is intended to be protected by section 17. Further, and this point brings us closer to the issue raised by counsel in the present dispute, it may be doubted whether such an organization is providing the kinds of "services and facilities, with or without accommodation" that are the proper domain of section 17. Section 17 requires that a line be drawn between the kinds of services and facilities that can be provided on a discriminatory basis to the membership of certain religious and other types of groups on the one hand, and the kinds of services and facilities that must be provided only in the egalitarian market place envisaged by the Code. In short, in attempting to apply section 17 to particular cases, it may be asked whether the organization in question is of the kind envisaged by section 17 and whether the services and facilities are of a kind so envisaged. In my view, the heritage preservation mission and activities of the D.S. Park Inc. are indeed services of a kind envisaged by section 17 and the organization is itself of the kind eligible for protection under that section.

In the present case, counsel for the Commission has argued for a somewhat different limitation on the scope of section 17 which would, in his view, preclude its application to the present facts. Counsel for the Commission suggested that there are four elements to be established in determining whether section 17 applies. First, it must be established that the circumstances involved concerned "equal treatment with respect to services and facilities,

with or without accommodation". Second, it must be demonstrated that the circumstances concern "membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization". Third, that organization must "primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination". Fourth, membership in the organization must be "restricted to persons who are similarly identified".

Counsel for the Commission conceded that the nature of D.S. Park Inc. and its activities successfully met the second, third and fourth branches of this test. That is, he conceded that the organization is a "fraternal or social institution or organization", that it is "primarily engaged" in serving a group of individuals identified by a prohibited ground of discrimination and finally, that its membership is restricted to individuals similarly identified. Thus, counsel for the Commission did not take the view that the fact that the community ostensibly served by the organization's activities is the Danube Swabian community, whereas the membership condition relates to a broader Germanic ethnic connection or linguistic ability is a matter of significance. Presumably, the Commission's position on this point was that it was not inconsistent with the stated objectives of the organization to pemit other German speaking individuals to participate in the activities of the organization. The alleged problem in applying section 17 to the D.S. Park, according to

counsel for the Commission, is that it cannot meet the first branch of the test relating to "services and facilities, with or without accommodation". Counsel for the Commission argues that this first branch of the test is met only if the "accommodation" in question is of less importance than the provision of other "services and facilities". These other "services and facilities" must be something other than accommodation, it was argued, since the section stipulates that those other services and facilities may be "with or without" accommodation. In the present case, counsel for the Commission argues, the primary benefit being conferred by the D.S. Park Inc. upon its membership is accommodation. For section 17 to apply, he argued, the other "services and facilities" must be primary and the accommodation, if any, must be secondary or incidental to the provision of those other services or facilities. By way of illustration, counsel suggested that a religious summer camp for children would meet the section 17 test as the accommodation thereby afforded is incidental to the program offered to the children. Indeed, counsel for the Commission made reference to the legislative history of section 17 which suggests that religious summer camps were explicitly referred to in the discussions of the legislature as a type of institution that would be protected by the provision. On the other hand, counsel suggested, the owner of an apartment building who installs a Christian chapel in the basement and then refuses to rent apartments to non-Christians would not be able to rely on this provision.

Counsel for the D.S. Park responded to these submissions by arguing that the language of section 17 itself does not suggest that the relationship between "services and facilities" on the one hand and "accommodation", on the other, must be that of primary as against secondary or incidental. The word "primary" or "primarily" does not appear at this point at section 17. Rather, the word "primarily" appears at a later point in the section with reference to the objectives or activities of the organization. Counsel for the Commission has conceded that the D.S. Park Inc. is "primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination". Further, counsel for the D.S. Park Inc. suggested that the appropriate test to deal with such hypothetical situations as the apartment building with the chapel in the basement is to ask whether the provision of services to a membership group identified by a prohibited ground of discrimination is merely a ruse or sham being used by the organization or individuals in question in order to commit acts of discrimination for reasons unrelated to the objectives served by section 17. In the present case, he argued, the evidence suggests that membership of the D.S. Park Inc. is completely sincere and genuine in its pursuit of the social and cultural goals of the organization. There is no factual foundation for any suggestion that the D.S. Park Inc. was attempting to invoke section 17 in order to provide a cloak for discriminatory activities.

My own view is that the proper interpretation of section 17 on this point lies somewhere between the two positions advanced by counsel. I find the interpretation offered by counsel for the Commission unattractive inasmuch as it appears to read into the provision a requirement that accommodation cannot be an important part of the "benefits package" conferred by a legitimate fraternal organization upon its membership and because it requires a weighing of the relative importance of accommodation as against other services that may be not merely difficult but perhaps impossible in particular cases. In the present case, for example, how would one determine whether "accommodation" has assumed such importance for the membership that it has become primary whereas the other benefits are merely incidental. No easy measure is at hand. The majority of the resources of the D.S. Park Inc., both physical and financial are devoted to the other services. Indeed, it is argued that D.S. Park does not itself provide "accommodation" as such. Even if one rejects this proposition, however, the energies and resources of the D.S. Park Inc. per se are plainly devoted in the main to services other than accommodation. Should one ask, then, what relative importance is attached by the membership to accommodation as against the other services. There is no evidence on this point. Further, it is not at all obvious how the membership of the D.S. Park generally or individual members would answer the question "Is it the "accommodation" or the other "services and facilities" offered by the D.S. Park Inc. that led you to join this organization or that constitutes its major

attraction for you?". Perhaps many would respond by suggesting that its a combination of some kind of the two. Certainly, and the Complainant's evidence concerning his current lack of interest in moving to the D.S. Park may be thought bo be consistent with this point, there would be little reason to join the D.S. Park Inc. if one was not interested in the cultural and social activities that take place at the D.S. Park and elsewhere. One can easily imagine other difficult cases. In nursing homes and senior citizens facilities of various kinds organized along ethnic or religious lines, is it the accommodation that is dominant or the other "services and facilities"? It is not my intention here to offer an opinion as to whether facilities of this kind are protected by section 17. Rather, my point is that the proper analysis of the application of section 17 to such facilities is not advanced by trying to determine whether "accommodation" is the dominant benefit in such a facility. Accordingly, I am not inclined to read into section 17 a requirement that the application of section 17 rests on a simple weighing of the relative importance placed by the membership on the "services and facilities" provided by the organization in question as against the "accommodation" made available.

On the other hand, I am not completely persuaded that a satisfactory reading of section 17 would exclude its application only where the "services or facilities" are offered in effect as a sham or disguise for the selling or renting of accommodation on

a discriminatory basis. The provision of simple accommodation *per se* is not the kind of "service or facility" that could be the subject of protection under section 17. This much we can infer from the apparent need to explicitly indicate in section 17 that "services and facilities" can be provided "with accommodation" The supplying of the accommodation on what would otherwise be a discriminatory basis is defensible only if it is in some way legitimately related to supply of the other "services and facilities". Plainly, if the other "services and facilities" provided are merely a sham for enabling the supply of accommodation on a discriminatory basis, section 17 would not apply. However, it seems to me possible that there might be cases where, even though the membership of the organization is perfectly sincere and genuine in the sense that they do not have an intention to evade the application of the provisions of the Ontario Human Rights Code, the organization in question may be providing "services and facilities" other than accommodation that are so peripheral and insubstantial that the provision of the accommodation in question may contravene the Code and escape the protection of section 17. Further, there might be situations in which there is no real connection between the "other services and facilities" and the "accommodation". It is in this latter sense that the provision of accommodation must be related to or incidental to the other services provided by the organization. If the "services or facilities" being provided to the membership are of substance, however, and, importantly, if there is a legitimate connection

between the accommodation provided and those services or facilities, the first branch of the section 17 test would, in my view, be met.

Thus, for example, if the hypothetical "religious land owning club", referred to above, attempted to invoke section 17 by erecting a place of worship within its residential subdivision so that it would be providing both a "service or facility" and "accommodation", section 17 would remain inapplicable. There would be no rational or legitimate connection between the "facility" and the "accommodation". To provide a place of worship in an urban setting, there is no reason or need to create a nearby residential community consisting entirely of adherents to that religion. Thus, even if the group in question was sincerely attempting to provide services to a particular community and therefore not creating a sham device for the sole purpose of invoking section 17, the organization in question would not, in my view, be able to invoke the protection of section 17 with respect to the purchase and sale of memberships that carried with them the "ownership" of properties within the subdivision.

The present case, however, is very unlike a hypothetical fact situation of that kind. The D.S. Park is not simply a rural subdivision of residential properties. The D.S. Park is a recreational property which is not set up for year round residency. Parenthetically, I should note that counsel for the Commission

identified a number of members of the D.S. Park Inc. who listed addresses within the D.S. Park as their mailing addresses. Mr. Volk explained that these individuals are people who spend their summers at the D.S. Park and their winters in Florida. The Park effectively functions on weekends only during the winter months, however. This fact, together with the extensive common land and facilities which occupy 85 of the approximately 130 acres in the parcel render the D.S. Park rather unlike an ordinary residential subdivision. More importantly, the broad range of social, cultural, athletic and religious activities that are conducted at the D.S. Park during the summer months give the facility both the appearance and the reality of a summer recreational program with a substantial cultural and ethnic heritage preservation component. Counsel for the Commission concedes that children's summer camps organized along religious lines would be acceptable on the basis of section 17. The accommodation provided by the summer camp provides a setting within which certain religious and other activities will take place. The nature of D.S. Park Inc. and its membership and the activities conducted through the summer months at the D.S. Park are somewhat analogous to such a program. The "services and facilities", other than accommodation, which the D.S. Park provides to its members are of a substantial nature. Further, there is, in my view, a reasonable or rational connection between the services provided and the "accommodation" made available to the members. For these reasons, I am satisfied that section 17 is applicable to the circumstances of this case.

Counsel for the Commission is surely correct in suggesting, however, that if the D.S. Park were merely an ordinary rural subdivision - dressed up to look like a cultural or ethnic club - it would not attract the protection of section 17. In my view, this would also be true even if the building lots were only used for recreational or cottage-type purposes. It is no more acceptable under the Code to discriminate in the supply of cottage properties then it is to discriminate in the supply of housing. Thus, the ability of D.S. Park to rely on section 17 is very much dependent on the nature of the association's cultural mission, the services and facilities provided to the membership and the fact that the D.S. Park itself is used as an environment for the attainment of its cultural and social objectives. Thus if, over time, the nature and extent of the organization's activities change or diminish, its ability to invoke section 17 may change or diminish as well.

A further point was made by counsel for the D.S. Park Inc. It may be noted that the services or facilities provided to the membership of a group within section 17 need not be related to what has been referred to here as heritage preservation. Counsel for the D.S. Park Inc. argues, however, that where, as in the present case, the services or facilities provided by an organization are aligned to this objective, special considerations apply. More particularly, the preservation of the multicultural heritage of Canadians is a social objective that has received expression in the

fundamental law of our country. Thus, the Canadian Charter of Rights and Freedoms set out in the Constitution Act, 1982, Part 1, provides as follows in section 27:

> " 27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

Accordingly, or so it is argued, section 17 of the Ontario Code ought to be given an expansive interpretation in situations where the activities of a particular organization are directed towards the objective of fostering that constitutional value. My own view is that the cultural or heritage preservation mission of the D.S. Park Inc. is indeed relevant in determining that this is the type of institution or organization that section 17 is meant to protect. Further, its mission is relevant to the determination of whether the "services or facilities, with or without accommodation" are of a kind which section 17 protects. Section 17 does, however, protect other kinds of activities - such as religious activities - and there is no reason, in my view, to assume that multicultural activities are to be unusually privileged within the confines of section 17. More particularly, I see no reason to read a particular privilege concerning the relationship between other "services and facilities" and "accommodation" into section 17 for multicultural activities. Having found that the non-accommodation "services or facilities" provided by the D.S. Park Inc. are substantial in nature and that they bear a reasonable or rational connection to the accommodation provided to members, this

requirement of the first branch of the section 17 test is, in my view, satisfied.

On the foregoing basis, then, I am satisfied that all of the elements of the section 17 test are met and that the activities of the D.S. Park Inc. and, more particularly, its policies on membership, do not constitute a contravention of the Code. To the extent that it fails to provide "equal treatment with respect to services and facilities" it does so in a manner which is rendered acceptable by section 17 of the Code.

VI

If it is correct to hold that section 17 of the Code applies to the circumstances of the present case, it follows that the complaints against the D.S. Park Inc. and Ms. Schmidt must be dismissed. Other defences were raised by the respondents, however, and it is appropriate to direct some attention to them in this decision. First, it was submitted that even if section 17 is unavailable to the respondents, the circumstances of this case do not bring it within either section 2(1) or section 3, (the two sections, other than section 12, under which the complaints were brought). The objection to the complaint under section 2(1) is that it pertains to "equal treatment with respect to the occupancy of accommodation" and, it is argued, obviously relates to the provision of temporary accommodation such as hotel rooms. Thus, even if it could be said that either respondent was making available a right of occupancy of accommodation, that right would

be of an indefinite or permanent nature and therefore would not be covered by section 2(1).

The objection taken with respect to the complaint under section 2 bears only on the respondent D.S. Park Inc. It is argued that the D.S. Park Inc. does not contract with its members and, in any event, did not itself refuse to contract with the Complainant. Counsel for the respondent D.S. Park Inc. further suggested that if indeed section 17 was unavailable to the respondents, the only complaint that could have been brought would have been under section 1 of the Code. Section 1 provides as follows:

> ." 1. Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, age, marital status, family status or handicap."

In short, it is argued that the respondents have been complained against under the wrong sections of the Code.

In considering these objections, it will be useful to briefly summarize the circumstances of this case that appear to be established on the evidence and further, to characterize the nature of the benefits conferred upon the membership by D.S. Park Inc. Notwithstanding the hearsay nature of some of the evidence upon which it is necessary to rely in order to reach these conclusions, I am satisfied that the evidence in totality before this proceeding

established the following set of circumstances. The respondent Schmidt was a member of the respondent D.S. Park Inc. It is a condition of full membership in the organization that an individual be German speaking and approved by a membership committee. The respondent Schmidt was entitled to occupancy of a building lot at the D.S. Park by reason of her membership. Desirous of terminating her membership and realizing a return on the transfer of the building placed on that building lot, she placed a listing with W. Frank Real Estate Limited through its sales representative Ms. Franssen, this company and this individual being the respondents to complaint 10-315c. The listing, consistently with the by-laws of the D.S. Park Inc., states that at least one of the occupants must be either of German extraction or German speaking and that the purchaser must be approved by a committee. The Complainant visited the site, saw the "Private property: members only" signage at the Park, formulated an intention to purchase the property and submitted a verbal offer to do so through his agent, Ms. Mayer. The evidence does not establish the nature of any conversations held by Ms. Mayer with Ms. Schmidt. I am satisfied, however, that the offer was rejected by reason of the Complainant's inability to meet the conditions of membership and, more particularly, because he was not German speaking. The evidence does not establish the precise manner in which the offer was rejected. It is evident, however, that the offer must have been rejected either by Ms. Schmidt or someone acting on her behalf or by the D.S. Park Inc. Further, it is evident that the reason for turning down the offer

was rooted in the by-laws of the D.S. Park Inc. If the D.S. Park Inc. was not actively involved in the rejection of the Complainant's offer to the respondent Schmidt, I am satisfied that, on the balance of probabilities, the reason for its rejection was an attempt by Ms. Schmidt or someone acting on her behalf to implement and act upon the membership rules.

Against this background, I am satisfied that the D.S. Park was either directly involved in or indirectly responsible for the rejection of the Complainant's offer of purchase. Assuming the most favourable set of plausible facts from the perspective of D.S. Park Inc., we may assume that the offer was rejected because the respondent Schmidt believed that she was required to reject it by virtue of the membership rules of the D.S. Park Inc. Assuming, for the sake of exploring the analysis, that this would place Ms. Schmidt in breach of the Code, I am satisfied that it would also place the D.S. Park Inc. in breach of the Code as having done something, i.e. adopt a set of membership rules, that, in the words of section 8 of the Code, "directly or indirectly" had the effect of forming the basis for a rejection of the Complainant's offer to purchase. Accordingly, the absence of direct evidence concerning the precise nature of the involvement of the D.S. Park Inc. in rejecting the Complainant's offer is not fatal to the complaints launched under sections 2(1) and 3 of the Code. The question that remains, however, is whether the language of either one or both of those sections applies to the circumstances of this case.

The analysis of these related questions is rendered somewhat difficult by the absence of a clear understanding as to the precise nature of the legal rights which club members have with respect either to the building lots to which they, as members, are assigned or to the structures which they may place upon them. Although counsel representing the various parties to the present dispute were of the view that it was not necessary to formulate a precise legal characterization of these relationships, I understood it to be their view that the club member had something in the nature of a license to occupy the building lot in question and that it was, in some sense, that license that Ms. Schmidt was attempting to transfer subject, of course, to the approval of a membership committee. Assuming, as counsel appeared also to assume, that club members actually own the physical structures which they place on the building lot, we may also assume that Ms. Schmidt was intending to transfer those rights of ownership to an intended transferee. What must be considered, then, is whether the transfer of a bundle of rights of that kind can be considered to be the conferral of a right of "occupancy of accommodation" within the meaning of section 2(1) or whether an individual, such as Ms. Schmidt, who refused to enter into an agreement to transfer such a bundle of rights in a discriminatory fashion would have infringed the right to contract conferred by section 3 of the Code. My own view is that whatever be the proper characterization of Ms. Schmidt's ownership rights vis à vis the physical structure, the transfer of the license to

occupy the building lot in question is the indispensable prerequisite to being able to occupy accommodation on the building lot in question. On this basis, it appears to me that an individual who is denied such a transfer on discriminatory grounds would have been denied the right to "equal treatment with respect to the occupancy of accommodation" under section 2(1) of the Code. Further, as the intended arrangement between the respondent Schmidt and the Complainant was contractual in nature, the respondent Schmidt, at least, would have infringed the section 3 right to contract as well. As I have indicated above, although the D.S. Park Inc. was not intended to be a party to the agreement to be entered between the respondent Schmidt and the Complainant, D.S. Park Inc. did participate, either directly or indirectly in the rejection of the offer.

As previously noted, counsel for the D.S. Park Inc. also made the suggestion that section 2(1) should be limited to temporary "accommodation" such as hotel rooms. Although, to be sure, the reference in section 2(1) to "occupancy of accommodation" is suggestive of a legislative concern with the phenomenon of hotel facilities and other similar arrangements, there is, in my view, no reason to restrict the scope of this provision in this way. The ordinary meaning of the terms "occupancy" and "accommodation" is not restricted in this fashion and no policy reason of any kind was suggested in argument as a basis for giving a narrow reading of this kind to section 2(1). Accordingly, it is my view that section

2(1) is broad enough to capture circumstances in which a club or other fraternal organization has adopted a practice of conferring licenses on members of the organization to occupy premises of various kinds.

Counsel for the D.S. Park has also argued that the entire transaction which the Complainant attempted to enter into with the respondent Schmidt is void inasmuch as it fails to comply with the subdivision control scheme set out in section 49 of the Planning Act, R.S.O. 1980, chapter 379. Briefly stated, the underlying problem is as follows. The respondent Schmidt did not own the building lot to which she obtained a right of occupancy as a member of the D.S. Park Inc. Further, that building lot is simply part of a larger parcel of land which is owned in fee simple absolute by the D.S. Park Inc. In order to separate out that building lot as a distinct parcel and convey full title to the Complainant, it would have been necessary to seek appropriate official approvals for such a subdivision of the property owned by the D.S. Park Inc. A contract entered into without such approvals would be void and unenforceable. Thus, counsel for the D.S. Park argues that the attempted offer of purchase could only have resulted in a transaction which was void by reason of these provisions. Assuming, for the sake of analyzing the point, that what was intended by both the Complainant and the respondent Schmidt was to enter into a simple contract for the purchase and sale of the plot, I am nonetheless of the view that reliance on these provisions of

the Planning Act cannot constitute a valid defence to the complaint in the circumstances of this case. The Planning Act problem would disappear, presumably, if the Complainant had offered an agreement to the respondent Schmidt in which she would undertake to assist the Complainant in seeking membership in the D.S. Park Inc. together with an allocation to him of the building lot to which she had occupancy rights and further, in which she agreed to transfer whatever her rights were to the structure located on the building lot in question for an agreed price. It is not the fault of the Complainant, however, that the offer was not cast in this acceptable form. The Complainant was not made aware of the unusual nature of the ownership of the land in question. Accordingly, to deny the application of the Code on the basis that the offer fails to comply with the Planning Act would be to penalize the Complainant for the respondent Schmidt's failure to provide information with respect to the nature of the offer that would have been appropriate. The publication of an ordinary real estate listing in which she identified herself as "owner" had the effect of inviting the kind of offer the Complainant in fact made. Accordingly, it is my view that the respondent Schmidt, at least, should be considered to be estopped from arguing that the offer was not in a valid form because she was not in fact the "owner" of the property and was therefore incapable of transferring title. If I am correct in the view that the Planning Act argument is not available to the respondent Schmidt, neither can it avail the respondent D.S. Park Inc. for what has been referred to above as

their indirect involvement in or responsibility for the respondent Schmidt's conduct.

VII

Finally, consideration must be given to the complaints relating to section 12 of the Code. That section pertains to the publication or display of notices or signs indicating an intention to infringe a right conferred under Part I of the Code. Counsel for the Commission has argued that Ms. Schmidt infringed this provision by listing the property with a real estate company in the manner previously described. It is alleged that the D.S. Park Inc. has infringed section 12 by posting a sign "Private Property: Members Only" on or near the entrance to the D.S. Park. If I am correct in holding that the section 17 defence is available to the respondents, these complaints are unfounded and must also be dismissed. Were it not for the availability of that defence, however, it appears to be plainly the case that the real estate listing does indeed indicate an intention to restrict sales on the basis of a prohibited ground of discrimination. It is not my view, however, that the complaint against the D.S. Park Inc. is well founded even if the section 17 defense is unavailable. The mere posting of a sign indicating that access to facilities is restricted to members only or that it is private property does not in itself indicate an intention to discriminate on the basis of a prohibited ground. Counsel for the Commission has argued that such

a sign should be viewed in the context of other information concerning the membership rules of the Club. While I do not discount the possibility that there may be circumstances in which a sign posted in a place where it is visible to the public may need to be read in the context of other information made available to that public through means other than the sign itself, the evidence led in this proceeding does not provide any reason to believe that the D.S. Park Inc. has communicated such information to the Complainant or to the public more generally in the present case.

VIII

From the foregoing analysis, it follows that the complaint filed as Exhibit 2 in these proceedings which contains a series of complaints brought against the respondent D.S. Park Inc. and the respondent Dorothea Schmidt should be and is hereby dismissed.

This Board of Inquiry remains adjourned sine die for the purpose of entertaining whatever submissions the parties or their counsel deem appropriate with respect to complaint 10-315c, which has been filed as Exhibit 1 in these proceedings.

Dated at Toronto this 28th day of September, 1990.

John D. McCamus
Board of Inquiry

Supplementary Order

CONFIDENTIAL

THE ONTARIO HUMAN RIGHTS CODE,

S.O. 1981, Chapter 53, as amended

IN THE MATTER OF the complaint made by Mr. Paul Gregory alleging discrimination in accommodation by Donauschwaben Park Waldheim Inc., and Ms. Dorothea Schmidt.

AND IN THE MATTER OF the complaint made by Mr. Paul Gregory alleging discrimination in accommodation by W. Frank Real Estate Ltd. and Ms. Mary Franssen.

A HEARING BEFORE: Professor John D. McCamus

Appointed a Board of Inquiry in to the above matters by the Minster of Citizenship, the Hon. Gerry Phillips, to hear and decide the above-mentioned complaints.

Appearances:

R. E. Charney	Counsel to the Ontario Human Rights Commission
P. Gregory	Complainant
S.L. Wassenaar	Counsel for Donauschwaben Park Waldheim Inc.
R.G. Matthews	Counsel for Dorothea Schmidt
J. Rosolak	Counsel for W. Frank Real Estate Ltd.

SUPPLEMENTARY ORDER

This supplementary order concerns the second of two complaints brought by the Complainant with respect to an unsuccessful attempt to acquire rights to a particular piece of land. This Board of Inquiry was separately appointed to hear and decide each of the two complaints. It was ultimately determined that the two complaints should be joined in one proceeding. A decision was issued by this Board with respect to the first complaint, Complaint No. 10-314C, on September 29th, 1990.

The second complaint, filed as Complaint No. 10-315C on July 23, 1986, alleged breaches of the Complainant's right to equal treatment with respect to the occupancy of accommodation without discrimination because of race, ancestry, place of origin and ethnic origin, and alleged that the respondents caused to be published before the public a notice that indicates the intention of the person to infringe a right under Part I of the Human Rights Code, contrary to section 12(1) and 8 of the Code;

In due course, the Complainant and the Respondents, W. Frank Real Estate Ltd. and Mary Franssen entered into fruitful discussions and ultimately determined that they wished to settle the complaint without a hearing. The parties entered into an agreement for this purpose dated June 14th, 1989. That agreement has been approved by the Ontario Human Rights Commission. The parties have all requested that the terms of that agreement be entered into an Order of this Board of Inquiry.

Accordingly, this Board of Inquiry orders as follows:

1. The Respondents, W. Frank Real Estate Ltd. and Ms. Mary Franssen will pay to the Complainant Three Thousand Dollars ($3,000.00), in general damages.

2. The Respondents, W. Frank Real Estate Ltd. and Ms. Mary Franssen will provide the Commission with a letter of assurance that they will comply with all requirements of the Human Rights Code.

3. The Commission and the Complainant will maintain the identity of the Respondents, W. Frank Real Estate Ltd. and Ms. Mary Franssen, in the strictest confidence, but remain free to disclose all other terms of settlement. The said Respondents will be referred to as "a real estate company and a real estate agent" in any public reference to this matter.

Dated at Toronto this 17th day of December, 1990

John D. McCamus
Board of Inquiry